

APPENDIX Q -- RELOCATIONS, ALTERATIONS, VACATIONS AND ABANDONMENTS

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APPENDIX Q

RELOCATIONS, ALTERATIONS, VACATIONS AND ABANDONMENTS

Q-73-000 Scope of Section. This section is applicable to contracts covering transactions for the relocation, abandonment, vacation or alteration of existing highways, roads, railroads, utilities, cemeteries, municipal facilities and structures which involve the acquisition of an interest in real estate unless indicated otherwise herein. (See Q-73-701.)

Q-73-001 Definition. The term "relocation" includes raising, lowering, altering, adjusting or protecting a facility, as well as changing its location.

Q-73-002 Relocation of Federally Owned Facilities. Facilities of other Federal agencies may not be relocated or altered using Civil Works funds unless specifically authorized by statute for the particular project. A series of Comptroller General decisions has so held.

Part 1 - Policy of Acquisition of Real Estate Interests
Through Relocation

Q-73-100 Scope of Part. This part sets forth the policy of acquiring fee, easements and other interests in land which will interfere with project development, by providing substitute facilities in accordance with agreements known as relocation contracts.

Q-73-101 Coordination. The relocation of facilities is a function involving procurement, legal, real estate and engineering principles. All four divisions or branches of the office involved will participate in or be kept informed of studies and developments regarding the relocations required for a project. Representatives of all four divisions will actually participate in all discussions and negotiations with those owning or controlling the facility to be relocated or removed; however, in cases where the problems have been adequately discussed within the office, it is permissible that one person may be the representative of more than one division or branch. All four divisions or branches will participate in the preparation of the contracts or agreements.

Q-73-102 Legal Background. In United States v. Miller (1943, 317 U. S.369, 63 S. Ct. 276, 87 L. Ed. 336) the Supreme Court has said that "the Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken." This is not to be construed as authorization for payment for special or consequential damages.

Q-73-103 Basic Policy. Where there will be a "taking" of an interest in real estate, it is necessary for the Federal Government to acquire, extinguish, or subordinate such interests in real estate. The objective of such acquisition is to enable the Government to operate its project consistent with the liability imposed by the Fifth Amendment.

Q-73-104 Acquisition. The acquisition of such real estate interests can be accomplished by either:

- (i) An agreement between the Government and the owner, or
- (ii) A condemnation of the owner's real estate interests.

Either procedure requires the payment of just compensation. However, all negotiations for an agreement should be conducted with full appreciation and judicious use of the fact that the prerogative of the Government to condemn can always be resorted to, if all reasonable efforts to negotiate are unsuccessful. In the event negotiations fail to result in a reasonable agreement with the owners, the circumstances should be reported to the Chief of Engineers for consideration, including the advisability of resorting to condemnation.

Q-73-105 Just Compensation. The Fifth Amendment to the Constitution of the United States provides that just compensation will be paid for the taking of private property for public use. The Constitution and General Statutes do not attempt to define criteria to establish just compensation. The determination of "just compensation" is a judicial question. The courts, in their attempt to set a practicable standard, have adopted the concept of market value for privately-owned property. In publicly-owned roads and utility systems, as well as in privately-owned railroads and utility systems, the Federal Courts have held that the liability of the United States for such acquisition is the cost of providing substitute facilities where substitute facilities are, in fact, necessary. Conversely, where it can be shown that there is no necessity for such substitute roads, railroads, or utility systems, or portions thereof, the Federal Government is required to pay only nominal consideration. Of course, in the case of a railroad or utility system, the owner is entitled to salvage value, if any. If the owner of a facility, which is to be abandoned, holds fee title to the land, payment, based on usual appraised value, will be made for the land, as such.

Q-73-106 Substitute Facility. Where a replacement is necessary, a substitute facility will be provided which will as nearly as practicable serve the owner in the same manner and reasonably as well as does the existing facility. Such facilities usually will be relocated outside the project limits except when they can be feasibly adjusted or protected within the project limits so as not to interfere with the construction, maintenance and operation of the project.

Part 2 - Preliminary Procedure for Acquisition of Real
Estate Interests Through Relocation

Q-73-200 Scope of Part. This part sets forth the preliminary procedure for acquiring easements and rights-of-way which will interfere with project development by providing substitute facilities.

Q-73-201 General. The preliminary procedure consists of (i) determination of what facilities will be affected, (ii) determination of the legal obligation for relocation, (iii) a determination of compensable interests, and (iv) the proposal of a substitute facility, with a determination of its adequacy and reasonableness of cost. Results of these determinations and studies are presented in a Design Memorandum. Approval of the design memorandum is followed by negotiation of a relocation contract or by a condemnation action.

Q-73-202 Affected Facilities. Early planning for the project should disclose all facilities that will interfere with or be affected by construction, operation or maintenance of the project.

Q-73-203 Legal Obligations. The legal obligations of the Government regarding affected facilities and extent of authority for relocation, will be investigated by an attorney of the office involved. The results of the investigation and the determination of obligation and authority will be included in the design memorandum. References will be included to pertinent parts of the authorizing document, to any applicable special acts, and to the obligation regarding affected decisions, and the signed statement of the attorney, may be included as an appendix to the design memorandum.

Q-73-204 Determination of Compensable Interest. A compensable interest must be established prior to entering into negotiations for a contract for the abandonment, relocation or alteration of highways, roads, railroads, or utilities adversely affected by the construction or operation of the project. An investigation and report of all real estate phases of the problem will be prepared by a real estate attorney of the office involved. The results of this investigation will be presented in an attorney's report which will be incorporated in and become a part of the relocation design memorandum. The information contained therein will be utilized in conducting future negotiations, and will include:

(1) The names of all parties having title to or jurisdiction over the facility to be relocated or altered. This information will be obtained from the County Office of land records. The owner of the facility will be requested to furnish such records as possessed, which show evidence of title to the land.

(ii) Citation with excerpt thereof of the statutory or case law authority of the political subdivision to abandon and vacate or convey interest therein for roads, highways and utilities, and to accept conveyance from the Government of relocated highways, roads and utilities; also statutory citation with excerpt thereof of authority of corporations to abandon, convey and/or relocate utilities or railroads where involved.

(iii) The attorney's opinion as to the extent of the legal obligation of the United States to relocate or adjust facilities or make payment to the owner to meet project conditions and whether the owner has a compensable interest in land.

(iv) Appropriate reference to Section 2 of the 1938 Flood Control Act, (see par. Q-73-701), where no compensable interest has been established in a civil works project and the Government will relocate or adjust facilities, as a matter of policy.

(v) When it is proposed to reestablish a town or portion thereof (see par. Q-73-600), statutory citation and excerpt thereof of the authority to abandon roads, streets and facilities within the existing town or portion thereof, incorporate a new townsite or extend existing corporate limits, conveyance of title to existing roads, streets and utilities and acceptance of title from the Government of relocated roads, streets and utilities. A discussion with appropriate statutory citation and excerpt thereof of outstanding bonded indebtedness, if any, and procedure whereby such indebtedness is to be collected and retired.

(vi) Such other real estate problems as may be involved.

Except for reestablishment of towns or portions thereof, and cases where doubt exists as to whether the owner has a compensable interest or whether there will be a taking of the owner's interest, the Attorney's Report of compensable interest need not be submitted to the Chief of Engineers for consideration prior to preparation of the relocation design memorandum. Title evidence is not required for the release of outstanding rights, such as a quitclaim deed for the old right of way, in whole or in part. However, if the relocation contract will provide for acquisition by the Government of title to fee or easements, for retention and use as a part of the project area, arrangements will be made for procurement of title evidence covering the interests to be acquired, as set out in ER 405-1-620, paragraph 23.

Q-73-205 Obligation and Reporting.

Q-73-205.1 Determination as to Adequacy of Substitute Facility and Reasonableness of Cost. If it has been determined that a relocation, alteration or protection is required, it will be planned to afford a degree of serviceability and susceptibility to flood or other damages comparable to that possessed by the existing facility. Anything provided over and above such

construction at increased cost must be considered a betterment and the payment of cost thereof must be borne by the owner of the facility. The term "betterments" should not, however, be interpreted to include more costly construction or construction to a higher class if such is necessitated solely as a result of the relocation.

Q-73-205.2 Congressional Reporting of Major Relocations. House Report No. 2044, 89th Congress, 2nd Session, on the 1967 Public Works Appropriation Bill directs that plans on major relocations be submitted to the Committee for consideration prior to initiation of construction.

(a) For the purpose of this paragraph the term major relocation is defined as one estimated to cost ten million dollars or more.

(b) Design memoranda for major relocations so defined must consider and fully document all the feasible alternative plans for the relocation or purchase of the existing facility in order to present justification for the plan selected to the Appropriations Committee. Some of the items mentioned by the Committee are (i) use of other existing railroad and highway facilities in lieu of relocation, (ii) apparent upgrading of existing facilities in the construction of a new relocated line and (iii) large increases in cost from previous estimates furnished the Committee. These items should be especially well covered in the design memoranda studies.

(c) Submission of plans for major relocations to the Committees will require some additional time but probably not in excess of 60 days. Scheduling of planning work in relation to the construction schedule for the project as a whole should allow this additional time for approval by the Committee.

(d) A draft of the report to the Committee presenting a discussion of the factors considered in reaching the selected plan, an explanation of any increase in cost over the latest estimate submitted to the Committee and justification of any apparent betterments such as new rail in lieu of used rail, new buildings in lieu of moving buildings, expensive road bed stabilization, etc., will be prepared by the District Commander and submitted with design memoranda for major relocations. The draft of report should clearly show that the selected plan is the least expensive plan consistent with the necessity for the relocation and the legal obligations of the Government for performing the work.

Q-73-206 Highway Requirements for National Defense. In the relocation of highways and roads in connection with military installations, the procedures required by AR 55-80 will be followed. Defense access road requirements must be transmitted to the Director of Transportation, DCSRDA through command channels (AR 10-5, par. 2-26). Where necessary to expedite construction, District Commanders may submit the requirements through channels to the Chief of Engineers.

Q-73-207 Betterments Involving Federal-Aid Funds from the Bureau of Public Roads. The District Commander involved will ascertain whether the State intends to seek Federal-aid funds toward the cost of any betterments to be incorporated in the relocated road. Where Federal-aid is sought, the State must comply with the requirements of Federal-aid legislation (Title 23, United States Code, Chapter 1, Federal-Aid Highways). The District Commander should assure himself of the State's activities in this respect. (See ER 1140-2-3).

Q-73-208 Cemeteries. Cemeteries which will be flooded or will otherwise interfere with construction or operation of the project or will be left completely isolated, will ordinarily require relocation. However, if the cemetery may be feasibly protected, and/or access can be provided economically, the cemetery may be allowed to remain. Cemeteries subject to flooding may be allowed to remain only with the specific approval of the Chief of Engineers. (See Part 8 of this Section).

→ Q-73-209 Criteria for Relocated Facilities.

Q-73-209.1 Railroads.

(a) Load Limitations and Engineering Criteria. Relocated railroads will be built to the same load limitations and equivalent engineering criteria as possessed by the existing railroad facility.

(b) New Facilities Necessitated Solely by Relocation. Prior to selecting a negotiation position and informing the railway, the District Commander will obtain and evaluate documented evidence from the railways supporting their contention that any new features or facilities (for example, sidings, spur track, secondary track, station facilities, off track service roads, signal equipment, etc.) requested are necessitated solely as a result of the relocation. On the basis of these evaluations the District Commander will prepare proposals for negotiating settlements with the railways and will incorporate these data in a supplement to the relocation design memorandum and submit it to OCE, ATTN: DAEN-CCK, for approval. For documentation of files see Q-73-404.

(c) Facilities Planned but Not Constructed.

(1) If a railroad contends that it plans to construct improvements to the existing line and that such improvements would be adversely affected by their relocation, the District Commander will insist as a basis for further consideration by the Government, that the railroad submit documented evidence to clearly establish the railroad's official prior approval of plans and full scope of the improvement, the cost of the improvement on the line to be relocated and the cost of the improvement as increased by the relocation.

(2) The comparative costs thus furnished under (1) above will be verified by the District Commander, and on the basis thereof the railroad must further establish its willingness to assume, at its cost and expense, the amount equal to the estimated cost of constructing the improvements on the old line.

(3) Under the conditions set forth in (1) and (2) above and upon favorable recommendations of the District Commander and the Division Commander concerned in a letter report or design memorandum supported with full documentation, the Chief of Engineers will consider requesting approval of the Congress whenever he determines that the best interests of the Government can be served by participating in the cost of planned railroad improvements to the extent that the cost is increased by the relocation. Requests for construction funds for such increased cost of the work will be under normal budget procedures as a special construction project comparable to Q-73-209.7(d).

(4) Where convincing evidence is not available and adequate documentation cannot be made with regard to the imminence of construction of planned facilities by the railroad, and the Chief of Engineers so determines, Government participation in the increased cost of the alleged improvement occasioned by the relocation will be denied in further negotiations with the railroad.

Q-73-209.2 Highways.

(a) Future Economic Conditions. Decision as to economic impact of a substitute network of roads must consider the normal future economic growth of the area if the project were not constructed. The substitute network cannot include provisions of facilities for new traffic and population brought in by the project, other than highway access required by the Government's construction, operation, and maintenance activities and reasonable public access, which may be paid for by the Federal Government. Where the substitute network combines two or more roads into one, provision may be made for the additional traffic caused by the combination if the additional traffic is substantial or if it puts the highway in a higher class.

(b) Relationship to Land Acquisition. Relocations at Government expense will not provide for populations or activities in areas acquired by the Government for the project, except where the title taken allows continuation of the economic activity, such as agricultural or other use not prohibited by terms of the flowage easement.

(c) Limits. In providing a reasonable substitute for an existing highway network, the cost to the water resources project will not exceed either of the two following limits:

(1) Section 207(c) of the Flood Control Act of 1960 (33 U.S.C. 701r-1(c) as amended by Section 13 of the Water Resources Development Act of 1974 (88 Stat. 12, 17) states:

"(c) For water resources projects to be constructed in the future, when the taking by the Federal Government of an existing public road necessitates replacement, the substitute provided will, as nearly as practicable, serve in the same manner and reasonably as well as the existing road. The head of the agency concerned is authorized to construct such substitute roads to the design standards which the State or owning political division would use in constructing a new road under similar conditions of geography and under similar traffic loads (present and projected). In any case where a State or political subdivision thereof requests that such a substitute road be constructed to a higher standard than that provided for in the preceding provisions of this subsection, and pays, prior to commencement of such construction, the additional costs involved due to such higher standard, such agency head is authorized to construct such road to such higher standard. Federal costs under the provisions of this subsection shall be part of the nonreimbursable project costs."

The above quoted language is interpreted to allow a determination to be made by the Government of what the State, as a matter of practice, would build, given the existing traffic count, use, and location of the road. A substantial area exists in which adjustments may be made administratively in order to achieve uniform and equitable results. All states follow some practice, however varied, of using the current traffic count adjusted to include a projection of traffic. Future planning and negotiation may include a projection for up to twenty years in accordance with a defined state custom or established practice. The provisions of Subsection 207(c), as amended, apply to those projects not yet under construction, and at those projects under construction, to road relocations or identifiable components thereof which were not completed as of 7 March 1974, the date of approval of the Water Resources Development Act of 1974.

(ii) The cost of any road or highway relocation provided by the Government shall not exceed the alternative cost of acquiring the area and economic activity served.

(d) Procedure. A definite showing will be required in all cases that the solution proposed falls within the two limits specified in paragraph Q-73-209.2(c), above.

(e) Determination of Obligation Under Section 207(c) of the Flood Control Act of 1960, as amended, (33 U.S.C. 701r-1(c)).

(1) The basic purpose of the statute is to provide substitute roads that as nearly as practicable serve in the same manner and reasonably as well as the roads displaced. While the provision for replacement to

current design standards goes beyond what might otherwise be required for a substitute road to serve reasonably as well as the original, such provision is in essence merely a statutory expression of what the courts have held is generally required as just compensation for the taking of a public highway. (See 40 Comp. Gen. 520.)

(2) The burden is upon the State (or other political entity) to establish its entitlement to substitute roads of design standards higher than those of the roads being replaced. Upon determination of projected traffic at a date agreed upon between the parties as the "date of taking," the classification and design standard will be ascertained from the latest effective published State standards and design criteria for the highway system of the State outside of the Interstate system.

(3) Where the state has no published standards or where published standards are alleged by the State to be aged or outmoded and the State wishes to impose design criteria or standards higher than those contained in published documents (or if none are published, then to standards higher than those incorporated in the road to be replaced), the State should be required to show, at the very least, that the higher design criteria have been or are being maintained on comparable roads. Use of higher standards in one instance only will not be sufficient. The design criteria must be conclusively established to the satisfaction of the District Commander.

(4) Where county or state road standards, published or established by current practice, do not specify a wider minimum design, the minimum relocated public road for two-way traffic to be constructed on a Corps of Engineers project should have an 18-foot wide surface on a 26-foot wide crown. The minimum relocated public road for one-way traffic should have a 10-foot wide surface on a 16-foot wide crown. These minimum criteria do not apply to other Corps roads such as service roads in recreation areas. In the event that these minimum criteria are considered to be inadequate due to existing traffic needs, including safety considerations and traffic loads, road relocations may be built to the design standards promulgated by the American Association of State Highway and Transportation Officials.

(5) The Statute does not authorize the replacement of a road to Interstate standards solely because the road involved lies on or is incorporated in the National System of Interstate and Defense Highways under Title 23, United States Code, Chapter 1. The classification "Interstate Highway" is not in any way related to the classification required in connection with Section 207(c) and this statute does not relieve either the States or the Bureau of Public Roads from the burden of improving highways to Interstate standards where the Corps of Engineers relocates a road on the System. Unless current state standards for roads outside the Interstate System (determined pursuant to subparagraph (3) of this paragraph) are comparable to Interstate standards, replacement of a road by the Corps to Interstate standards would go beyond any reasonable compensation requirement for the road taken. Likewise, payment

for real estate acquisition beyond such real estate as is required for a replacement road to current standards of roads outside the Interstate system is not authorized in the law.

Q-73-209.3 Utilities.

(a) Relocated utilities will be built to the same capacities and equivalent engineering criteria as possessed by the existing facilities.

(b) Bases for determining just compensation for the relocation, alteration and abandonment of public utilities are as follows:

(1) To be relocated.

a. Relocation cost; - actual or estimated cost of the substitute facility.

b. Less depreciation of the facility to be replaced. Elements to be considered in determining the amount of depreciation credit, if any, will include the age of the facility as a whole, the age of the particular items to be replaced, and the expected future life based both on physical condition and obsolescence. Negotiations for obtaining a depreciation credit will be facilitated in most cases where it can be demonstrated that the proposed replacement will decrease the cost of maintenance or will defer future replacement by the owner. Thus the depreciation credit may be said to represent the total increased value accruing to the owner in having an old facility replaced with new material and construction at no cost to the owner. A zero depreciation credit may be appropriate when the relocation or replacement involves only a small portion of an existing facility and does not significantly alter either the useful life or maintenance cost of the facility or a principal feature or segment thereof.

c. Less salvage value of existing facility removed.

d. Plus cost of removal.

e. Less cost of betterments.

(2) To be abandoned and not replaced (including R.E.A. facilities).

a. If the facility to be abandoned does not interfere with the construction, maintenance, or operation of the project (and for this reason does not have to be removed) and if the probability of its being flooded is so remote as not to constitute a legal taking within the meaning of the Fifth Amendment of the United States Constitution, the land within the project boundary will be acquired subject to the outstanding rights, if any, and no compensation will be paid for the facility to be abandoned. This is consistent with the decision of the U.S. Court of

Claims of 15 January 1958 in the case of Southern Counties Gas Company of California v. the United States, 157 Fed. Sup. 934; 79 S. Ct. 23; 358 U.S. 815-Cert. Denied.

b. If the facility to be abandoned does interfere with the construction, maintenance, or operation of the project (and for this reason must be removed) or if it will probably be flooded so frequently as to constitute a legal taking within the meaning of the Fifth Amendment of the United States Constitution, compensation may be made, whether or not the owner has a valid real property interest, under the provisions of Section 2 of the Flood Control Act of 1938. In such cases, compensation will be limited to that portion of the facility lying within the project boundaries. Compensation will be based on:

- (i) Original cost of the facility.
- (ii) Less depreciation based on original cost.
- (iii) Plus removal cost.
- (iv) Less salvage value.

Q-73-209.4 Exclusion of Costs for New Materials. In view of the policy of not providing betterments at Government expense, contracting officers will not obligate the Government to pay for or furnish new materials if used materials of value and usability equal to those in the existing facility are available or can be obtained as salvage from the existing facility or otherwise, unless the provision of such new material is more economical. If, despite the availability of used material, the owner of the facility to be relocated or altered desires new material, where the use of such new material represents an additional cost, its use will be approved when the additional cost is assumed by the owner.

Q-73-209.5 Capitalized Costs.

(a) Operation and maintenance costs of a substitute facility are by their very nature highly speculative and are considered as consequential damages. Such costs will not be allowed in relocation contract settlements unless there is clear and specific legal precedent arising from judicial actions.

(b) Where a substitute facility introduces a completely new element, the added operation and maintenance costs specifically attributable to that element may be allowed. The period of time for which operation and maintenance costs will be allowed may be the estimated project life or some lesser time under certain conditions such as the time for which the responsible agency would have been required to make a change pursuant to other than project requirements. Examples include a movable bridge substituted for a fixed bridge (extra costs only); and entirely new pumping plants required only as a result of a reservoir project.

(c) A capitalized sum covering the costs for increased operation and maintenance may be considered for a plan other than for the substitute facility, for which the Government is legally obligated, if such plan is the most economic solution for the relocated facilities compared to one without capitalized operation and maintenance and is one which cannot legally be forced upon the owner without his consent.

(d) Except for the situations in subparagraphs (b) and (c) of this paragraph, payment for added operation and maintenance costs in other instances will not be allowed as a Federal cost. Examples in which operation and maintenance costs are considered consequential damages and will not be allowed include adverse length or size of relocation or individual features thereof; adverse design characteristics; and the item of increase in taxes.

(e) Engineering criteria, cost elements involved, requirements of State law, legal and regulatory material and any other pertinent data bearing on increased operation and maintenance costs will be presented to the Chief of Engineers in a design memorandum or as a supplementary document thereto. The position and recommendations of both District and Division Commanders will be included in transmittal correspondence.

Q-73-209.6 Deferred Construction Costs. Under circumstances where the relocated portion of a railroad (and limited to railroads only, except when specifically approved for highways in each instance by the Chief of Engineers) which involves cuts and fills cannot be considered to constitute an adequate replacement until seasoned to withstand the same conditions as the old facility, or where subsidence, sloughing, or other damages may be anticipated for a period of time subsequent to the completion of the new construction, the cost involved in stabilizing the new facility, over and above ordinary maintenance, may be allowed for a reasonable period of time, but not to exceed 5 years after such relocation has been placed in operation. However, it should be understood that the Government's obligation is to pay only the actual costs of such work and only on a reimbursable basis. No predetermined lump sum payment will be allowed. Such work will be considered as deferred construction.

Q-73-209.7 Corps of Engineers Cooperation with Other Federal and non-Federal Interests in Facilities in Civil Works Project Areas Where Projects Are Authorized But Where The Construction Funds Therefor Have Not Been Appropriated.

(a) Under the following conditions, the Chief of Engineers will consider authorizing financial cooperation with States or other property owners and interests who desire to install public-use facilities (roads, utilities, pipelines, railroads) at locations in areas that will be affected by projects for which construction funds have not been appropriated.

(1) The project concerned has been authorized.

(2) There is reasonable expectation that the project will be placed under actual construction within the foreseeable future.

(3) The Government's share of the cost of installing the facility in a location and at an elevation that will be compatible with the Federal project, plus accumulated compound interest at the prescribed rate for the estimated period prior to Federal project construction, will be less than the cost of relocation at a later date.

(b) Under the conditions set forth above and upon the favorable recommendation of the Division Commander concerned, the Chief of Engineers will consider requesting approval of the Appropriations Committees to use available civil works funds for necessary advance studies, and of subsequently requesting approval of the Congress for provision of construction funds in an amount necessary to recompense the owner for the extra cost of installing the facility to his standards in such a location or in such a manner that it will not have to be relocated when actual construction of the project is started. Payment for the additional costs will be made only as the actual installation by the owner progresses.

(c) Caution must be exercised by the contracting officer in his negotiations in order that Federal payment is limited to that extra amount which is dictated solely by the project. It is recognized that this may be difficult in instances where the project planning has not progressed to the extent necessary to determine the elevation of the proposed taking line. In such instances the conditions proposed to be accepted by the contracting officer, and the justification therefor, will be submitted by letter report for prior approval by the Chief of Engineers before any discussion on this subject relative to the bases for settlement are held with the owner.

(d) Proposals for use of Federal Planning funds will be referred by OCE to the Senate and House Committees on Appropriations for approval. Division Commanders will forward a draft letter, ATTN: DAEN-CWO, for this purpose. The draft should refer to the views on this subject expressed by the House Appropriations Committee in Report No. 2181 on the FY 1967 Public Works Appropriations Act. Requests for construction funds for relocation work will be made under normal budget procedure as a special construction project.

Part 3 - Relocations Design Memoranda

Q-73-300 Scope of Part. This part deals with the manner of presenting relocation information in design memoranda and the nature of the information to be presented. (For general procedures for design memoranda see ER 1110-2-1150.)

Q-73-301 General. All engineering, real estate and legal aspects of relocation problems and proposed solutions will be presented in sufficient detail to serve as a basis for (i) preparation of the relocation agreement and (ii) detailed design and preparation of plans and specifications. Depending on the number and complexity of relocations involved in a project, the relocations may be covered in (i) the General Design Memorandum, (ii) a feature design memorandum for all relocations, or (iii) a series of feature design memoranda for relocations divided by ownerships or categories. The possibility of coordinating relocations of different ownerships should be covered, such as a common highway in a network of state and county roads, a common embankment for adjacent railroad and highway, or relocating a pipeline or pole line along a railroad or highway. All relocation actions will be planned, designed and accomplished so as to minimize both the environmental disruptions associated with the relocation, per se, and to avoid or minimize subsequent adverse impacts on the ecological, visual and human-cultural values of the project impact area. Relocations should be viewed as a possible tool for enhancing the environmental quality of the project impact area. The minimum coverage of relocations to be presented in the General Design Memorandum should be in accordance with paragraph 1u of Appendix I or ER 1110-2-1150. For relocations not sufficiently covered in the General Design Memorandum, the feature design memoranda on relocations will include but not be limited to the following:

Q-73-301.1 For All Relocations.

(a) Statements as to facilities affected by the project, legal obligations of the Government, and ownership of the facilities. These may be supplemented by references to the Attorney's Report (see Q-73-204) and legal citations and statement (see Q-73-203) included as appendices to the design memorandum.

(b) Maps of the project area of sufficient extent to show clearly the location of affected facilities with relation to the rest of the project. The maps will show controlling lines such as top of conservation and flood control pools, real estate guide taking lines, and actual taking lines if pertinent and known. The maps will also show location of proposed replacement facilities. Symbols should be used to show different categories; color symbols are usually helpful. Common categories are such as "To be abandoned", "To be relocated", "To be raised or protected on existing alignment", "Relocated (facility)". Where more than three or four affected segments are shown, the individual items should be identified by numbers or by a combination of letters and numbers.

(c) Description of existing facilities affected, including but not limited to lengths, types, sizes and capacities, and date of construction. Inclusion of photographs is helpful in some cases. The amount of description required varies with the degree of complexity involved in individual

cases, and whether the replacement is strictly in kind. In some cases, plans, sections, elevations and profiles should be used to supplement the description. State of maintenance should be described. Controlling low elevations should be given. Give frequency and duration of flooding under existing conditions.

(d) Full description of proposed plan of relocation, including drawings if necessary to supplement the description. If higher standards are proposed there should be a statement as to whether the higher standards are required as a result of the project, or whether betterments are involved which should be at the expense of the owner. The proposed relocation should be discussed with relation to alternative alignments or alternative methods of protection.

(e) Basis for establishment of minimum elevations and clearances.

(f) Special requirements imposed by the project, including interference among relocations.

(g) Full description of the impact of the proposed relocation on the project environment at the relocation site, a description of measures planned to mitigate damage to the environment, to enhance the environment or to retrieve a more favorable environment. In the case of unmitigated damage, give reasons why the relocation could not be realigned to reduce the environmental damage. Proposed relocations will be considered in preparing the five point statement for the project, as required by the National Environmental Policy Act of 1969 (P. L. 91-90). See ER 1105-2-507.

(h) The attitude of the owner with regard to the proposed plan of relocation.

(i) A cost estimate showing quantities and unit prices, allowances for contingencies and for Government indirect costs. Where applicable, items for depreciation and salvage credits should be included. Method and estimate of allocation of cost to owner should be stated where betterments are involved.

(j) Proposed form of relocation contract, which party will design the relocation, and which will do the construction or administer the construction contract. A proposed lump sum or fixed price contract or any proposed lump sum payment to the owner under a cost reimbursement contract or under a contract calling for performance of part of the work by the Government will be supported by justification to enable the approving authority to properly evaluate the circumstances requiring the use of that method of contracting.

Q-73-301.2 For Highways and Roads (in addition to Q-73-301.1).

(a) The area covered by the maps should be great enough to show the

overall network of roads, including alternate routes around the project in case the affected roads were not relocated.

(b) Give current average daily traffic counts as required to establish the classification of the roads. This is required in order to determine the standards of the relocation to be made as a project expense. (See Q-73-209.2(o)(1).) Provide statement of the owner's standards for the classification determined. If the classification is to be increased based on traffic projections, the basis for such projections should be set forth. For minor roads which would unquestionably be in the lowest classification, estimated traffic volume may be given. Where the relocation involves a major rearrangement of a network of roads, additional appropriate traffic information should be included, such as nature of traffic, local or through, and percentage of trucks, source and destination, also a traffic flow map showing counts at pertinent locations.

(c) Statements should be included regarding special conditions such as mail and school bus routes, relation of residences to business centers and places of employment. Where a mail or school bus route system would be seriously affected if the relocation were not made, and there is question of the economic justification for the relocation, it may be desirable to show on a map the existing route and alternate routes without the relocation. Such a map should show location of the houses served and the location of post office or school, or the direction to it if off the map.

(d) Feasibility of permitting intermittent flooding should be discussed, including but not limited to the following factors:

- (i) Frequency and duration of flooding.
- (ii) Disruption to traffic when closed, and alternate routes available.
- (iii) Cost to the Government as compared to cost of relocation.
- (iv) Attitude and views of the owning body to convey a flowage easement.

(e) Except in cases where word description can be clear, it is usually desirable to supplement the description of the proposed relocation with drawings. Such drawings should include typical cross sections, plans of the relocation to larger scale than the general map, plans, elevations and sections of bridges and major drainage structures, profiles of the relocation, especially in the vicinity of major drainage structures, in the reservoir, or in rough terrain. Profiles should show proposed crown, existing natural ground, and if the proposed alignment is on or near the existing, the profile of the existing road should be shown.

(f) The basis for determining required size of bridge openings and other drainage openings should be presented.

(g) Consideration should be given to reuse of bridges from abandoned routes in the relocated routes. Bridges to be left in place should be identified.

Q-73-301.3 For Railroads (in addition to par. Q-73-301.1).

(a) State amount and type of traffic.

(b) Give design loading of existing bridges. State design loading for proposed bridges.

(c) Provide information as to possible abandonment without replacement, also possibility of joint operation with some other railroad.

(d) Discuss possible use of "used" track material. (See par. Q-73-209.4.)

e) Include information and drawings similar to those called for under par. Q-73-301.2(e), (f) and (g).

Q-73-301.4 For Utilities (in addition to par. Q-73-301.1).

(a) The maps should indicate other corresponding utility lines in the vicinity of the project, to show whether it would be practicable to provide substitute service from another direction at less cost than relocation of the line actually affected. Where an affected line for which a replacement is proposed serves only isolated or scattered customers beyond the affected segment, the location of the customers should be shown on the map.

(b) Show clearly the basis for determining just compensation, including charge for depreciation, in accordance with paragraph Q-73-209.3(b).

Q-73-301.5 For Towns. Design memoranda for relocation of towns should include information in accordance with any of the applicable preceding paragraphs and with Part 6 of this section.

Q-73-301.6 Special Statutory Authority. Design memoranda for relocations under special statutory authority should include information in accordance with applicable portions of paragraphs Q-73-301.1 through Q-73-301.4 and with Part 7 of this section.

Q-73-301.7 Cemeteries. A cemetery relocation Plan will be prepared and submitted in accordance with Part 8 of this section.

Q-73-302. Approval of Relocations Design Memoranda. Except in minor relocations involving relocation with all conditions nearly identical to

the existing conditions, no action on negotiations with the owner will be taken until the Relocation Design Memoranda have been approved. This requirement does not preclude the holding of discussions with the owner to obtain his views and any information pertaining to contemplated changes in the facility. In fact, this procedure is to be encouraged, but prior to approval of the design memorandum care must be taken that no commitments are made or implied or any statements are made which might be interpreted by the owner as commitments.

(a) The Division Commander is authorized to approve feature design memoranda for the less complex relocations of roads, railroads and utility lines when all of the following conditions prevail:

(1) The design memorandum covers all affected segments of an owner.

(2) The obligation and authority for relocations at Federal expense is clear.

(3) The proposed relocations conform to the criteria of paragraphs Q-73-209 through 209.6.

(4) There are no special or unusual problems involved.

(5) The general plan for the relocations has been approved in the General Design Memorandum.

(b) Design memoranda for relocations other than those described in subparagraph (a), above, will be submitted to the Chief of Engineers for approval.

(c) If a plan of relocation or settlement with the owners for an affected facility is materially changed from that approved in a design memorandum, a supplement or revised design memorandum will be submitted for approval.

Q-73-303 Submission and Distribution of Relocations Design Memoranda.
(See also ER 1110-2-1150, par. 19.)

(a) For those requiring approval of the Chief of Engineers, five copies should be submitted if they pertain only to utility lines, and ten copies if the work involves several phases of engineering as well as legal and real estate problems.

(b) For those approved by the Division Commander, four copies as approved will be forwarded to HDQA (DAEN-ECE-B) for information and reference.

Part 4 - Contract Procedure for Acquisition
of Real Estate Interests through Relocation

Q-73-400 Scope of Part. This part sets forth the contractual procedure for acquiring easements and rights-of-way through relocation contracts.

Q-73-401 Methods of Performing the Relocation. The actual work of relocating facilities may be accomplished by either of the following procedures or a combination thereof:

(a) The usual arrangement is for the owner to agree to make the actual relocation of his facilities and to convey to the Government his easements or rights-of-way, and the Government, in consideration thereof, agrees to compensate the owner for the cost of the relocation work performed by him.

(b) The work of relocations may be accomplished by Government forces or by contract between the Government and a party other than the owner of the facility to be relocated. Contracts between the Government and a party other than the owner can be frequently utilized to the mutual advantage of both the Government and the owner. The performance of the actual relocation work by Government forces or by a Government contract with a party other than the owner must be predicated on either:

(1) An agreement between the Government and the owner concerning the relocation of the facility by the Government and a granting by the owner to the Government of the owner's easements or rights, or a subordination thereof, or

(2) A condemnation of the owner's easements or rights provided that, prior to performance of the actual relocation work by Government forces or by a Government contract with other than the owner, a stipulation or agreement is reached with the owner concerning the relocation of the facility.

Q-73-401.1 Performance of Engineering Services. In the arrangements for engineering services in connection with relocation and alteration of facilities, the following is furnished for guidance:

(a) If all design work for a relocation is contracted for with an architect-engineer (A-E), then the contract for engineering services shall provide for the preparation of appropriate design memoranda in accordance with ER 1110-2-1150 and Part 3 of this section. See also paragraph 4 of ER 1110-2-1150. Approval of the design memorandum will be obtained prior to preparation of plans and specifications. However, if the relocation plan has been previously covered in an approved design memorandum, the contract with the A-E would be governed in a manner similar to other A-E contracts. (See ER 1110-23-1).

(b) The owner of the facility to be relocated may be engaged to perform engineering services for the relocation with the same provisions as above. (See paragraph 6d(2) of ER 1110-23-1).

Q-73-402 Contract Forms.

(a) The terms and conditions incident to the relocation of a facility shall normally be covered in a contract using as a guide either A-307 (lump sum) or A-308 (cost-reimbursement).

(1) Lump sum contracts may be used on minor relocation contracts when the probable cost of administration of a cost-reimbursable contract approaches closely or would exceed probable contingencies contained in a lump sum contract. A minor relocation contract is defined for the purposes of this section as one with an estimated cost or settlement of \$100,000 or less.

(2) Cost-reimbursable contracts should be used on all major relocation contracts. Since the theory of relocations is that the owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken, the cost-reimbursement contract eliminates the possibility of profit or the risk of loss.

(3) In the event it is proposed to use a lump sum contract with an estimated cost over \$100,000, a detailed cost analysis will be performed of the owner's proposal prior to negotiation. Cost analysis is defined as the review and evaluation of the owner's estimated costs, in order to form an opinion on the degree to which the owner's proposed costs represent what performance of the contract should cost, assuming reasonable economy and efficiency. The contract auditor will assist in the cost analysis by reviewing the factual portion of the owner's submission to verify that it is current and accurate. Such audits may consist of desk reviews of cost data or examinations of the owner's records, at the discretion of the auditor.

(b) Purchase Order, DD Form 1155, may be used for minor facility adjustments in connection with major relocations of roads or railroads where highway or railway officials desire that the Government contract for necessary adjustments of utility lines. Adjustments must not exceed \$10,000 or less and the change in realty interest is between two facilities owners. The DD Form 1155 should be supported with a schedule describing the alteration or removal work to be performed, the location and description of realty adjustments, and providing Government with a release of claims occasioned by and resulting from work. The DD Form 1155 is not for use where the facility adjustment work is within the project area, except where alteration of the utility is necessary so as not to interfere with the actual construction of the project. In all cases where DD Form 1155 is not for use, the forms in A-307 or A-308 should be used in order that necessary real estate subordinations or interests may be acquired by the Government.

(c) Where abandonment, relocation or alteration of a road, railroad, pipe line or public utility is required to eliminate interference with a

project, it is permissible for the Division or District Commander to recommend, in extenuating circumstances, the purchase of the facility rather than entering into the standard relocation agreement.

(1) In the case of abandonment, the purchase price will be based on the salvage value of the facility, plus fair market value of any land or interests therein acquired for project purposes.

(2) In the event there is an established necessity for continued use of the facility, the purchase price will be based on the appraised fair market value of the facility to be acquired or the estimated cost of the most economical and reasonable plan of replacement, adjustment, or relocation. If the latter basis is used, and the purchase price is in excess of the fair market value of the facility to be acquired, there must be a definite showing of need for continuation of the services provided by the affected facility. Where it is obvious that the fair market value of the facility is less than the estimated cost of the most economical and reasonable plan of replacement, adjustment, or relocation and where, at the same time, preliminary negotiations clearly indicate that the owner of the facility will not settle on the basis of fair market value, a staff appraisal will, normally, be sufficient to establish fair market value rather than incurring the expense and time delay of obtaining an industrial contract appraisal.

(3) In the event of use of this procedure, the purchase instruments (option, deed, etc.) must contain clauses providing that completion of the acquisition shall fully discharge the Government from the obligation, if any, to relocate or replace the purchased facilities, in whole or in part.

(4) It must be recognized that when relocations and adjustments are accomplished under this paragraph, there is always the risk that the owner will not accomplish the work for which it is being paid, or will not accomplish it to the full extent used as the basis for such payment; and that there is therefore the possibility of a future public relations problem, when those who wish to be served by the relocated or adjusted facility attempt to place the blame for lack of service on the Corps of Engineers or seek special legislative relief. This risk will not be serious in cases involving payment for the relocation or adjustment of a small portion of a large operating railroad, utility or highway. However, this danger should be considered in those cases where we are dealing with the facilities of political subdivisions or of small utility companies serving a limited number of consumers, and as much assurance as possible be obtained that the work for which payment is made will actually be done. Information as to assurance in this respect should be included in the submission or recommendation for approval of the purchase procedure.

(5) If the purchase results in the acquisition of a complete facility or major unit thereof (such as a water or sewage plant), whether

within or outside the project area; or in the acquisition of fee, flowage easement or subordination of minerals within the project area, it must be supported by title evidence and the title opinion of the Attorney General, as required under ER 405-1-600.

(6) For the reasons given in (4) and (5), above, the use of this procedure is not encouraged and commitments will not be made to the owner without prior approval of each case by the Chief of Engineers. A draft of the proposed real estate instrument will accompany the report and recommendation of the Division Commander.

Q-73-403 Approval of Relocation Contracts. Except for the approvals required by Q-73-403.2, the Division Commander is authorized to approve relocation contracts and modifications thereto without monetary limitation and to delegate such authority to District Commanders in whole or in part; provided, such contracts or modifications are in accordance with an approved design memorandum or an approved revision thereof (see Q-73-302(c)) and the contracts have been executed on the forms in A-307 and A-308 without material deviations unless such deviations have been approved by the Chief of engineers for general application. Relocation contracts and modifications thereto will not be made subject to the approval of the Chief of Engineers.

(a) Authority of Representatives of the Contracting Officer. On relocation contracts, resident and area engineers may be designated as authorized representatives of the contracting officer where contract forms in A-307 and A-308 are used. Where the owner is required to perform the work and the contracting officer approves drawings, schedules, and specifications for the work, the authorized representatives may issue written instructions approving changes in such drawings, schedules and specifications, provided that such modifications and changes do not involve a change in the amount of the contract, are within the general scope of the work, are consistent with approved design memorandum and do not deviate from policy in this section of. When it is desired to exercise this authority, the following clause will be added to form in A-307 or A-308:

AUTHORIZED REPRESENTATIVE OF THE CONTRACTING OFFICER

The area (resident) engineer is the authorized representative of the contracting officer for the purpose of issuing instructions and entering into modifications pursuant to requirements for changes in drawings, schedules and specifications previously approved by the contracting officer and the owner, provided that such modifications and change do not involve a change in amount of the contract.

(b) Authority of Representatives Where Government Performs Work. Where the relocations contract provides that the Government will perform the construction work, the procedure in 1-406.50 for designating a

COR will be followed where it is deemed necessary to appoint an authorized representative. Also, in such cases the clause prescribed in subparagraph (a), above, will be inserted in the relocation contract with the owner.

Q-73-403.1 Approval of Material Deviations in Relocation Contract Forms.
In the event material deviations in relocation contract forms are necessary and such deviations have not been previously approved by the Chief of Engineers for general application, requests covering only such deviations will be submitted to the Chief of engineers, ATTN: DAEN-CCR, for appropriate action. Letters transmitting such requests will clearly indicate the extent and nature of the deviations, the reasons therefor, and the position and recommendations of both the District and Division Commanders. Approval of any such deviation will not constitute approval of the contract of which the deviation is a part. (See Q-73-403.)

Q-73-403.2 Approval for Use of Lump-Sum Relocation Contract. In each instance where it is proposed to use a major lump-sum relocation contract or to make a payment on a fixed price basis under a cost-reimbursement contract or a contract where part of the work is performed by the Government and the lump sum involved exceeds \$200,000, the prior approval of the Chief of Engineers shall be secured. In addition to a current Government estimate, a detailed cost analysis as prescribed in Q-73-402(a) (3) with determination necessary to minimize the possibility of profit or risk of loss to the owner should accompany the request.

Q-73-404 Documentation of files on Negotiations for Relocation Contracts.
Full documentation shall be maintained in the records of the contracting officer for all items of cost considered during preparation of cost estimates and negotiations for relocations. Documentation should include cost of alternatives, justification for inclusion and basis for unit costs used. Some items, not necessarily inclusive, to be included are:

- (i) Automatic signaling devices vs. manual operation.
- (ii) New rail in lieu of old rail.
- (iii) The most economical method of disposing of used rail.
- (iv) All costs, both construction and user, needed to determine most economical alignment.
- (v) Betterments.
- (vi) Maintenance roads used in connection with railroad
- (vii) Change in building types.
- (viii) Need for all buildings or other structures.

- (ix) Use of owner's existing facilities for rerouting traffic in lieu of temporary substitute facilities.
- (x) Number and length of railroad sidings.
- (xi) Improvement in degree of curvature or grades.
- (xii) Access roads in lieu of real estate acquisition.
- (xiii) For townsite relocations, supporting data for number of lots and extent of utilities, updating the study just prior to award of construction contract, and other evidence prescribed by Part 6 of this section.
- (xiv) Number of traffic lanes.
- (xv) Assumption of maintenance for new items.

Part 5 - Real Estate Phases of Relocation Contracts

Q-73-500 Scope of Part. This part elaborates on the real estate phases and related actions of relocation contracts.

Q-73-501 Acquisition of Lands or Interests therein for Relocation Outside of Project Area. Generally, real estate interests will not be acquired by the Government outside the project area for use by the owner. However, in the event the owner desires that the real estate interests be acquired by the Government and such action is considered to be to the best interest of the Government, an appropriate article may be incorporated in the contract to provide for such acquisition. If the owner acquires, on a reimbursable basis, real estate interests outside of the project limits, which acquisition is the responsibility of the Government, the consideration paid for such real estate interest must have prior approval of the contracting officer.

Q-73-502 Grant of Right-of-Way by the U. S. When the proposed relocated route traverses Government-owned land, the contract will provide for the grant of a right-of-way by the Government, with proper reservation to the Government, where necessary, such as the right to flood to a contour elevation, subrogation of the owner's rights to the right of the United States, provided that the authority of the Government to make such grant is not exceeded. Authority of the Department of the Army to make grants for rights-of-way over areas acquired in fee is found in ER 405-1-909. (See Copy attached)

(a) Civil Works Land. When necessary the relocation contract will provide that the form of deed from the Government to the owner for the relocated right-of-way will be subject to the approval of the Secretary

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* Now in ER 405-1-12
see IX
FD 11-106 and
Q-73-502
* 11-109

of the Army. The Secretary of the Army is authorized to exchange lands acquired for flood control projects for privately owned land required for project purposes. (See ER 405-1-909, par. 21.) Relocation contracts are normally predicated on the acquisition by the Government of an interest in land. If, in fact, the Government is acquiring an interest in land from private parties (States, political subdivisions, utility companies, etc.) pursuant to the relocation contract, the Government may, pursuant to the provisions of the exchange statute referred to in ER 405-1-909, provide for the grant of a similar interest over Government-owned land. Normally, a greater estate will not be exchanged by the Government for a lesser estate, but, conversely a lesser estate may be exchanged for a greater estate.

(b) Military and Air Force Land. The "exchange of lands" Act referred to above applies only to civil works projects. Authority and procedure to be followed in exchange of lands in military projects is set forth in ER 405-1-909, Section III.

(c) Where the fee simple title is to be acquired to any lands involved in the relocation of facilities, the title evidence and the title procedure will be the same as required for fee acquisition by ER 405-1-600.

Q-73-503 Contracts Involving Local Interest Participation. Where easements and rights-of-way are to be procured by local interests but the work of the relocation is a Federal responsibility, the relocation contract should include (i) WHEREAS article making reference to authorizing document, stating that interest in land will be provided by local interest by name, and (ii) a right-of-way article which will state that interests in land are to be provided by local interests at no cost to the owner and that the owner will convey a flowage easement to or subordinate its interests within the project boundary to the operation and maintenance of the completed project.

Q-73-504 Condemnation. Where a satisfactory relocation contract cannot be negotiated or a valid title cannot be acquired by conveyance, the necessary real estate interests should be obtained through condemnation proceedings. In such cases the District Commander will recommend, through channels, the institution of condemnation proceedings. Such requests will contain a complete statement of all facts and reasons for the institution of condemnation proceedings, together with the recommendation of the Division and District Commanders and the assembly required by paragraph Q-73-504.1. Generally, a petition in the condemnation proceedings only is filed, leaving to the determination of the court, the legal liability of the United States.

Q-73-504.1 Condemnation Assembly. The recommendation for the acquisition of real estate interests by condemnation will contain the following assembly:

- (a) Map Exhibit (see ER 405-1-640).
- (b) Center line or other descriptions of all real estate interests to be acquired.
- (c) List of the names of all parties defendant.
- (d) Copies of the Attorney's Report and Relocation Design Memorandum required by Part 3 of this section.
- (e) Estimated value, if any, of interest being acquired and the fair and reasonable cost of replacement facilities for which the Government is considered responsible by law.
- (f) Copy of relocation contract, if any, or resolution, stipulation, or other statement by the owners agreeing to the compensation payable and to the abandonment and/or relocation of facilities involved.
- (g) Statement of funds available and citation of the authorization and appropriation acts.
- (h) Other data bearing on the acquisition of the real estate interests which may be useful in the successful prosecution of the condemnation proceedings.
- (i) The condemnation assembly will comply with applicable requirements of ER 405-1-640.

Q-73-505 Procedure for Extinguishment of Real Estate Interests Through Vacation and Abandonment. When it has been determined that there is no necessity for providing substitute facilities, particularly highways or roads, but it is necessary to extinguish the real estate interests of the owner, the owner will be requested to permanently vacate and abandon existing facilities without cost to the Government, and to initiate the necessary proceedings according to the local law to accomplish the vacation and abandonment or subrogate or convey their rights to the United States.

(a) The owner may be reimbursed as an overhead expense for the engineering, court, documentary stamps or other proper costs required in accomplishing such proceedings by means of a contract using the form in A-307 or A-308, as a guide.

(b) When an emergency exists for immediate barricading of roads and highways for a project, the prior permission from the authorized civil authorities will be obtained followed by the formal vacation and abandonment.

(c) The following data in triplicate will be forwarded to the Chief of Engineers upon completion of the permanent vacation and abandonment of roads and highways:

(1) Certified copy of resolutions, minutes of hearing or other proceedings abandoning and vacating the roads and highways.

(2) Copy of the statutory authority by which the civil authorities have acted.

(3) Map of the project area properly identifying the roads and highways vacated and abandoned to correspond with the description contained in the resolution or other proceedings. For clarity, roads vacated and abandoned will be colored red on the maps.

(4) Certificate prepared by an attorney of the real estate division, office of the Division or District Commander, that the proceedings have been regularly conducted and the permanent vacation and abandonment has been accomplished in accordance with local law.

Part 6 - Reestablishment of Towns

Q-73-600 Scope of Part. This part covers the policies and procedures relating to the Government's participation in reestablishment of towns or portions thereof insofar as the acquisition of private and municipal properties are concerned. The procedures and policies relating to the "taking" and/or relocation of municipal facilities and structures other than those covered by this part will be those followed in ordinary land acquisitions or those set forth in Part 7 of this section.

Q-73-601 General. There is no authority in the Secretary of the Army (by way of Federal legislation or Federal Court decisions) to pay the cost of physically relocating a town. Recognizing that project requirements dictate the acquisition of private properties within the project, the Government can participate in financing the cost of comparable streets and utilities in a new town in the event the governing body of the town and its citizens decide that a new town will, in fact, be established in lieu of the old town. Conversely, if no new town is to be established, the Government has no legal authority to pay other than a nominal consideration for the streets and utility systems in the old town since no substitute facilities would be necessary.

Q-73-602 Legal Considerations. The leading case in connection with the relocation of a town is United States vs. New Woodville, Oklahoma, 152 F 2d 735. Here, it was necessary for the Government to acquire the entire city of Woodville, Oklahoma. The city of Woodville dissolved and the town of New Woodville was incorporated. Only about 50 of the 300 residents of the city of Woodville moved to the new town. Only 3 of these were landowners in the old city. The Circuit Court of Appeals for the 10th Circuit pointed out that the payment of just compensation to a city for its streets cannot be measured by ordinary standards of value since the city's right

in the streets is impressed with its obligation to maintain them for public use, and stated further:

"It is well settled that the compensation to which a city is entitled when its streets are condemned is the cost of providing necessary substitutes therefor. But where a city is not required to provide substitutes and it is not necessary to do so, it has suffered no financial loss and is therefore not entitled to substantial damages for the taking of such public ways. Here, the Government took all the private property in the whole town. All the residents of Woodville moved away. There were none left. The very nature of the project was such that no new residents would or could come into town. There was therefore no need for new streets, sidewalks, or alleys. Woodville was completely relieved from the obligation to provide substitute ways. It therefore suffered no monetary loss for which it was entitled to substantial compensation. As a matter of fact, it surrendered its charter and ceased to exist.

"Before Woodville surrendered its charter, it assigned all its claims of any kind or nature that it had, to the town of New Woodville. But New Woodville, as assignee of the old city, could gain no greater rights against the Government than Woodville, the assignor, had. Had New Woodville been a relocation of Woodville, we would have an entirely different problem. But the court specifically found that it was not a relocation of the old town. This finding is amply sustained by the record."

Q-73-603 Procedure.

(a) A determination must be made by the district that the portion of the town not taken by the project is incapable of absorbing the residents and businesses of the town located in the project taking area who wish to remain in the town. When the vacant areas, buildings, and residences served by streets and utilities in the unaffected portion of the town exceed the requirements to accommodate all of the residents and businesses in the project taking area, relocation of streets and utilities will not be considered and a poll of the residents in the taking area as to their intention to relocate in the community will not be required. If the absorption capacity of the unaffected areas of the town is substantial, but not equal to the occupied properties in the taking area, a poll of the affected residents as to their intention to relocate in the community will be needed to complete the determination. This poll should be taken prior to submission of the General Design Memorandum for the project. The General Design Memorandum should present the foregoing determination and the following specific data for each affected town when the project will inundate only a part of such communities:

(1) The number of vacant residential, commercial, and industrial units in the unaffected portion of the town.

(2) The number of vacant lots served by streets and utilities in the unaffected portion of the town.

(3) Description of public buildings and facilities in the taking area-(town hall, fire house, parks, etc.).

(4) An attorney's report and determination of legal liability.

(b) Subject to the determination required by (a), above, the relocation of a town or a portion thereof is entirely a matter of choice with the town officials and the owners and tenants of private properties therein, and the town must formulate plans of its own to relocate the town to a new site. The responsibility for the selection of a new town site and the acquisition thereof rests with the town. The Government will acquire within the town all the privately owned real estate within the project boundary. The principal elements for consideration in determining the size and scope of town relocations are:

(1) The number and percentage of property owners and tenants in the affected area of the town who indicate their intention to move to the new site. The District Commander should not dictate to a town council or other governing body the manner in which it makes this determination, although he may offer his advice, and assist, if requested. Normally, the "election" necessary for the determination will be in the form of a circulated petition, or by ballot, in the nature of voting on any municipal issue. The electorate in these cases should consist of the the owners and any tenant occupants of properties in the project area, and what is desired is a determination of the number of property units which will be replaced or be represented at the new site. Accordingly, the following should govern:

a. Where both the property owner and his tenant indicate an intention to relocate to the new town and remain as landowner and tenant, their joint choice should be considered as a single unit. Joint ownership will be counted as one owner, unless a joint owner indicates his intention to establish a separate unit at the new site.

b. When both a property owner and his tenant indicate an intention to relocate to the new town, but to reside in (or outlease), and occupy separate properties, their choice would be considered as two units.

c. When either the owner or his tenant, but not both indicates an intention to relocate to the new town, the choice of the owner or the tenant would be considered as a single unit.

(2) A definite assurance on the part of the town officials, in the form of a formal resolution or ordinance, that the town or affected portion thereof will be reestablished at the new site.

(3) Whether the reestablished town will have a sufficient number of units at the new site, and the new site be so located, that the reestablished community will have essentially the same economic potential as the original community at a reasonable overall Federal cost. In making this determination, it must be recognized that the assurance by the town provided for in (2), above, cannot be regarded as a guarantee, but that it must be accepted as the best available evidence that the town will be reestablished. The results of the "election" described in (1), above, must also be regarded as the best available statistics. If decision under this paragraph (3) is that a true relocation will be achieved, the Corps of Engineers should cooperate fully in planning for its fruition. However, the Corps of Engineers cannot participate in town relocations when the statistics presented in justification thereof are obviously invalid or inadequate.

(c) Preliminary information regarding towns affected by the project will be included in the general design memorandum. See par. 1u of App. I, ER 1110-2-1150. The District Commander should ascertain informally from local officials, the attitude of the property owners and tenants regarding reestablishment of the town. No formal resolution, petition, or other request for the reestablishment of the town should be obtained at this stage. The general design memorandum will state the population of the affected town and population trends apart from project induced growth. The general map of the project area should indicate the affected area of the town. If there appears to be desire for reestablishment of the town, include data on the following matters:

(1) The number of affected units will be divided into residential (single, two-family, multiple), commercial, industrial and other.

(2) The number of property owners and the number of tenants affected and the probable number of property units which would be reestablished in the new location.

(3) Describe briefly the existing municipal facilities that are affected (streets, sidewalks, water and sewer systems, etc.).

(4) The legal authority whereby the town may reestablish or extend its corporate limits and the legal authorization permitting abandonment or conveyance of municipal facilities.

(5) A preliminary estimate of the probable Federal cost of reestablishment of the town.

(d) The Comptroller General in his report to Congress on compensating municipalities for relocation of facilities (B-1060628, dated 27 February 1968) has stated that payment allowing for any contingency in determining the extent of replacement facilities "constitutes compensation for indirect and speculative damages, which is prohibited by law", unless justified by

nonproject induced growth trends and existing growth capability in the area required. Accordingly, no allowance or payment for facilities in excess of those determined to be necessary to accommodate the people and businesses who intend to move will be made. If conditions regarding reestablishment of a town change subsequent to preparation of the general design memorandum, a letter report submitting the current conditions should be forwarded to the Chief of Engineers prior to detailed investigations and studies leading to preparation of a formal Attorney's Report and feature design memorandum. Continuing surveillance should be made by the District Commander as to the intentions of petitioners, i.e., property owners and tenants, to assure that there will be a sufficient number of units to be relocated and a sufficient number of people actually desiring relocation at the time of preparation of the feature design memorandum. This surveillance will continue subsequent to approval of the design memorandum throughout execution of the relocation contract and the procurement of construction pursuant thereto. Any change in the number of property owners and tenants will be considered for possibility of adjustment in the scope of substitute town facilities to be constructed at the expense of the Government.

Q-73-604 Feature Design Memorandum. The feature design memorandum for the reestablishment of a town will include but not be limited to the following:

(1) Map or maps of the existing town, showing corporate limits, streets, sidewalks, curb and gutters, municipally owned water, sewer and other utilities. Types and sizes should be indicated. The maps should also show all buildings at least in and near the portion of the town affected by the project, and lot lines, if available. Show also privately owned public utilities which will require relocation under agreement with their owners.

(2) Latest population count of the existing town. If not reasonably current, a current estimate should also be given. There should also be a current estimate of the population in the area affected by the project. Trend of population growth or decline should be given.

(3) General description of the town and the affected area, with more complete description of important special features.

(4) Inventory of existing public facilities, by feature, type, size, etc. (including buildings, parks, etc., which may require relocation under Section 111 of the Act of 3 July 1958 (33 U.S.C. 633)).

(5) Inventory of privately owned improvements, showing separately residences (single, two-family, and multiple), commercial, industrial, recreation, churches, clubs, etc.

(6) Numerous photographs showing typical and special features.

(7) Copy of a formal resolution or act of the officials of the town requesting the Federal Government to participate in the reestablishment of the town as a corporate entity.

(8) Statement of the total number of property owners and tenants in the affected area.

(9) A copy of the signed petition which has been circulated to the affected owners and tenants, or a recapitulation of the ballots cast, indicating the intentions of owners and tenants to relocate at the new site, and the number of units which they intend to reestablish, as set forth in Q-73-603(b)(1).

(10) Result of studies for protection in lieu of reestablishment of town. Proposed plan of new site, including the results of studies of any alternative sites. Reasons for choice of the recommended plan should be given.

(11) Proposed plan of relocation of the town's facilities. This presentation should follow applicable portions of Part 3 of this section. For municipally owned utilities, the required substitute system will be considered as full compensation for that taken, and no credit will be claimed for depreciation of the old.

(12) Discussion of public-owned facilities which come within the purview of Section 111 of the Act of 3 July 1958, as amended, (33 U.S.C. 633) that will be reestablished at the new site.

(13) Any other pertinent information that would be helpful in clarification of the proposal to reestablish the town.

(14) Opinion of the District Commander as to whether the reestablished community will have a reasonable economic potential, as compared to the existing community.

(15) Itemized estimate of Federal cost of reestablishing the town; also any non-Federal cost other than land.

(16) Conclusions and recommendations of the District Commander.

Q-73-605 Approval of Design Memorandum. Upon approval of a Design Memorandum for the reestablishment of a town or portion thereof by the Chief of Engineers, the Division Commander will be authorized to proceed with the reestablishment in accordance with the approved plan, subject to limitations stated in Q-73-603(d), above.

Part 7 - Relocations and Alterations Made Pursuant
to Special Statutory Authority

Q-73-700 Scope of Part. This part covers the relocation, alteration or protection of facilities made pursuant to certain specific and special statutory authorities.

Q-73-701 Lack of Compensable Interest - Civil Works. Where a public utility will be destroyed or damaged due to operation of a civil works project and relocation or alteration of the facility is required to continue service to the public, the Government may assume the cost of relocating or altering the facility (but not the cost for a new right-of-way) when, in fact, the utility owner is not presently vested with a compensable interest in the existing right-of-way. Negotiations with utility owners in accordance with the foregoing is authorized under Section 2, Flood Control Act of 1938, (52 Stat. 1215; 33 U.S.C. 701-c-1). (See Comp. Gen. Decision B-134242, 24 Dec 1957.)

Q-73-702 Facilities Damaged or Destroyed by Operation of Dams or Reservoirs. Section 9 of the Flood Control Act of 1946 (60 Stat. 643; 33 U.S.C. 701q) provides that, whenever the Chief of Engineers finds that any highway, railway or utility has been, or is being damaged or destroyed by operation of a dam or reservoir, he may take such remedial action as he considers proper. The owners of such facilities may be referred to this legislation in the negotiations for relocation contracts; however, no commitment will be made or included in any contract which would make future remedial action mandatory rather than discretionary.

Q-73-702.1 Procedure Under Section 9, Flood Control Act of 1946. Whenever the District Commander considers the damage is within the scope of Section 9, above, he may prepare a finding of fact with adequate documentation and submit it to the Chief of Engineers with recommendation for remedial action.

Q-73-703 Relocation of Facilities Owned by Governmental Agencies. Under the provisions of Section 111 of 72 Stat. 303, as amended by Section 309 of 79 Stat. 1094 (33 U.S.C. 633), the Chief of Engineers may, in civil works projects, protect, alter, reconstruct, relocate or replace, any structure or facility owned by an agency of Government (state, county, city or town or any legally created subdivision thereof) and utilized in the performance of a Government function. This law applies particularly to public structures and facilities such as schools, fire stations, etc., which will be treated separately from relocation of municipal facilities in kind pursuant to Part 6 of this section.

Q-73-703.1 Application of and Limitations on Section 111. The following operative considerations of Section 111 must be observed:

(a) The protection, alteration, reconstruction, relocation or replacement, provided in the Act, to meet the requirements of navigation or flood control or to preserve the safety or integrity of the facility when its safety or usefulness is determined by the Chief of Engineers to be adversely affected or threatened by the project, is discretionary with the Chief of Engineers.

(b) The law applies to navigation, flood control or related water development projects under the direction of the Secretary of the Army, heretofore authorized but not completed, and to those hereafter authorized.

~~*(c) The law applies to structures or facilities occupying beds of navigable waters.~~

(d) The law does not apply to real estate acquisition for military projects or to Atomic Energy Commission projects.

(e) The law is not applicable to work which is a requirement of local interests under local cooperation projects.

(f) The words "structure or facility" include an item such as schools, court houses, fire houses, hospitals, libraries, recreation centers, parks and other developed areas, publicly owned utilities, water supply facilities, etc., utilized in the performance of a governmental function. The terms would not include vacant land owned by an agency of government which is not used for a governmental function. For example, if an agency of government owns vacant land which it acquired through tax foreclosure or purchased for investment purposes, this would not come within the definition of a facility since the land is not being utilized for a governmental function. Unresolved questions relating to what falls within the category of a "structure or facility" will be referred to the Chief of Engineers for decision.

(g) The structure or facility must be owned by an agency of government (state, county, city, school district and other local instrumentalities of state or territorial governments) and there must be a current and continuing requirement for it in the performance of a governmental function.

(h) In discretionary findings necessary to implement Section 111, the Chief of engineers will give consideration to payment or partial payment by the United States for the actual cost, if any, of a new site for a facility or portion thereof requiring relocation. Accordingly, when it has been determined that the new site is not owned by the local governmental entity involved, and cannot be obtained by donation or otherwise, without cost, the Design Memoranda and other media by which Section 111 cases are submitted to the Chief of Engineers will contain the following:

(1) Data as to the requirements for land on which to construct the relocated facility or a portion thereof, including information as to

whether a site of greater utility than the old site (size, location, access, etc.) is necessary by reason of Federal, State, or other governmental standards, or because of betterments proposed by the city or other entity owning or utilizing the present facility, or for both reasons.

(2) Appraisal of the fair market value of the proposed new site.

(3) Narrative comparison of the new site to the old, with comments as to their relative utilitarian values.

(4) Appraisal of the old site (land only), made on the assumption that it is legally marketable, whether or not such is the case.

(5) Recommendation by the District Commander as to whether the United States should pay the cost of the new site, in whole or in part.

(i) Commitment for payment by the Government for the new site will not be made prior to review of the above data by the Office of the Chief of Engineers, and the issuance of instructions based thereon.

(j) The contract covering the relocation will provide for conveyance to the United States of all the right, title, and interest of the local governmental agency in the old site (land and improvements), without additional payment therefor.

(k) The law does not affect existing authorities relating to relocation of highways, railroads, and utilities, except to the extent that Government-owned structures or facilities may be involved which occupy the beds of navigation waters of the United States.

(l) Obtain assurances from the agency owning the facility that it will comply with Title VI of the Civil Rights Act of 1964 (78 Stat. 241; 42 U.S.C. 2000d, et seq). See DOD Directive 5500.11 issued pursuant thereto and published in 32 CFR, Part 300.

Q-73-703.2 Procedure for Invoking Section 111. When the District Commander is of the opinion that a structure or facility of an agency of the Government should be protected, altered, reconstructed, relocated or replaced in accordance with the terms of Section 111 and satisfactory evidence of continuing need has been furnished by the Government agency, the procedure set forth in Parts 2, 3 and 4 of this Section shall be followed. Since authority for approval under Section 111 is discretionary with the Chief of Engineers, it is important that all pertinent information be included in the Design Memorandum to assist him in the exercise of his discretion. This should include description of the existing and proposed work, with appropriate drawings and photographs; comparison of costs between relocation or replacement and protection or alteration. Where relocation or replacement is proposed, there should be, in addition to the estimate of cost of the proposed work, an appraisal of current market value

of the facility or an estimate of the present replacement cost of the facility, less depreciation. The requirement for obtaining appraisals is set forth in paragraph 3b of ER 405-1-300.

Q-73-704 Reimbursement of Costs for Railroad Relocations. In determining costs where, in whole or in part, relocation or alteration work on railroad bridges and facilities is to be performed by the railroad with its own forces, reimbursement should be in accordance with the provisions of paragraphs 4, 5, 6, and 7, and Attachment 1, of Section 3, Chapter 4, Volume I of the Federal-Aid Highway Program Manual published by the Federal Highway Administration, U.S. Department of Transportation. If the railroad will not accept the use of this manual, then reimbursement shall be on an actual cost basis. In all instances, the District Commander will consider the reasonableness of costs and will assure that cost items are not excessive. This criteria has application also to contracts for relocation or alteration of railroad bridges under special legislation where Congress requires cost sharing in accordance with the Truman-Hobbs formula. Use of any other predetermined rates, excepting the above, will be considered a material deviation requiring OCE approval.

Part 8 - Relocation of Cemeteries

Q-73-800 Scope of Part. This part covers the procedures and policies relating to relocation of cemeteries.

Q-73-801 General. The relocation and/or protection of cemeteries is premised on (i) acquisition of a real estate interest and (ii) extinguishment of the legal right of the next of kin to visit and preserve the burial grounds of their ancestors and relatives. It is the policy of the Corps of Engineers to respect the wishes of the next of kin as to the removal and reinterment of bodies. Ordinarily, just compensation for the acquisition of an existing cemetery site will consist of furnishing a new site comparable to the old site, plus disinterment and reinterment of the bodies, and transferring monuments and other facilities from the old to the new site.

Q-73-802 Preliminary Procedure.

(a) Submission of Cemetery Relocation Plan. A Cemetery Relocation Plan, in triplicate, will be submitted as a Design Memorandum to the Chief of Engineers for approval, and it will contain all essential factors and data, including but not limited to the following:

(1) Statement as to the necessity for relocation of the cemetery.

(2) Results of investigation, which will contain a description of each cemetery to be relocated, including location, type, number of

graves, improvements, state of maintenance, name of party or parties having control, and other appropriate information. Investigation will be thorough to safeguard against overlooking single graves and small private burial plots.

(3) Project or segment map showing location of the cemetery by cross symbol and tract number. In dam and reservoir project, the map will show all appropriate elevation lines and the taking line.

(4) Detailed map or plan of the existing cemetery, identifying graves by name and number. Graves not identified by name will be designated "unknown" and appropriately numbered. Buildings, roads and other facilities should also be shown.

(5) Photograph or photographs showing the cemetery in its entirety.

(6) Description of the reinterment site, including location, improvements, information as to whether it is an existing cemetery under the control of a duly constituted association or whether it is to be acquired and control thereover assumed by a newly formed association, and the names of the cemetery, the association, and the persons in the association. If the reinterment site is to be acquired, the appraised value thereof and full information as to when and how it will be acquired should be furnished.

(7) Map or plan of the reinterment site, showing the proposed location of each grave identified by appropriate number. Buildings, roads and other facilities should also be shown.

(8) Photograph or photographs of reinterment site.

(9) List of names of deceased persons, showing the following, where ascertainable, for each deceased person: race, date of birth, date of death, type of casket, type of monument, next of kin, address, relationship to deceased, whether next of kin has signed permit agreeing to the disinterment and reinterment of the body in the new cemetery site, whether next of kin prefers reinterment other than in selected site, and whether next of kin desires to be present at disinterment and/or reinterment.

(10) Estimated cost of relocating cemetery, with supporting data, prepared as an inclosure to the letter which submits the plan and not as an integral part of the plan.

(11) Copies of Invitation, Bid and Award, and Specifications.

(12) Certificate of District Commander:

a. That the plan of relocation is the result of a thorough and diligent inquiry to determine the location of graves proposed for relocation, the names and vital statistics of the bodies interred therein and the names and addresses of the next of kin.

b. That all of the next of kin who could be located were informed of the relocation plan either by personal interview or by correspondence.

c. That all the next of kin who were interviewed have signed either grave relocation permits in accordance with the plan or statements that they desire reinterment in another site.

d. That Exhibit _ of the Cemetery Relocation Plan is a true listing of all signed grave relocation permits which could be obtained.

e. That all original signed grave relocation permits are on file in the Office of the District Commander, where they may be inspected and where copies may be made.

(13) Statement of the officials, if any, in charge of the cemetery to be relocated, approving the plan of relocation.

(14) Statement of the officials of either an existing cemetery association, if relocation is to be in an existing cemetery, or of the newly formed association, if a reinterment site is to be acquired, approving the plan of relocation and agreeing that they will accept control of the relocated graves.

(15) Statement signed by an appropriate authorized state, county and/or city official that the plan of relocation meets the requirements of the state and local laws relating to the disinterment, transportation and reinterment of dead bodies, or if not required, a statement to this effect.

(b) Replacement of Vacant Burial Spaces. Since cemetery relocations are, in essence, replacements in kind, provisions may be made in the plan described in (a), above, for replacement of spaces available for future burials in existing cemeteries, within the following guidelines, which will be followed in developing items (a)(4), (7), (9), (10), (13), and (14).

(1) Where a present active cemetery is administered by an existing cemetery authority, with defined plots owned by separate families. In these cases, consideration should first be given to establishment of a new cemetery of equal size, or of a size decreased only in proportion to the reinterments to be made in other than the new site, in compliance with the wishes of the next of kin. Arrangements may be made, and reflected in the relocation plan, for assignment by the relocated cemetery authority of

family burial plots, substantially of the same size as exist in the cemetery to be relocated. If relocation is to be to an existing cemetery, the relocation plan may include a proposal for financing the acquisition of burial spaces for future use, in the same number as exist in the present family plot, or as desired by the next of kin, whichever is lesser, through payment for such spaces by the relocation contractor, with reimbursement to the contractor by the Government. The nature of the burial permits or rights to be issued by the cemetery authority, and the method proposed to assure their availability for use when needed, should also be covered.

(2) Where a present active community type cemetery does not fall into category (1), but where, through usage, various areas have been taken over by separate families, who may or may not have erected fences, curbing, or other artificial interior boundaries.

a. In these cases, the burial spaces for future use should be equal to the lesser of the following:

1. The number now available in the present cemetery.

2. The number desired by, and required for the burial of, the living members of the immediate family. In the event the desires of the family cannot be determined or resolved, it may be necessary to formulate the relocation plan on the basis of burial customs of the particular area, and perhaps of the particular cemetery being relocated. As a minimum, an additional space should be provided for a surviving spouse, for interment beside the deceased spouse, provided such a space now exists. If such a space does not exist in the present cemetery, it may be provided in the relocated cemetery at the expense of the next of kin, who should make all extra payments through the relocation contractor.

b. It will be preferable in this type of case to provide a new site, with family plots assigned, but if necessary to serve the best interests of the Government or to comply with the wishes of the next of kin, the additional spaces may be provided in an existing cemetery.

(3) Where a present active family burial plot is not held by title separate from the parent tract. In this type of case, the provision for additional spaces for future use, either by assignment of a burial plot by the authority administering a new site, or by provision therefor in an existing cemetery, should be in accord with the guidelines set forth in (2), above. This type of case is to be distinguished from that described in (1), above, even though the family owns the fee, and the lot is fenced. This is on the basis that there is no established burial area held in separate title as a cemetery, which can be used as a guide for replacement in kind.

(c) Perpetual Care. Provision for perpetual care should be included in the Relocation Plan if available at the old cemetery. It will also be given favorable consideration if it: (i) is required by state law for privately developed cemeteries; (ii) is to be provided at other relocated cemeteries for the same or a nearby project, which are located in another state requiring the provision of perpetual care; (iii) is required by the standing regulations of an existing cemetery which is the most feasible relocation site; and/or (iv) can be justified as a part of the most economical relocation plan which can be developed to the satisfaction of the trustees and/or the next of kin. If it is proposed to provide perpetual care on one or more of the above bases, it must be treated, as appropriate, in items (a)(2), (4), (6), (7), (10), (11), (13), (14), and (15), above. Where perpetual care is to be provided, the contract specifications should provide that the contractor will pay to the organization in charge of the relocated cemetery, in addition to the charge for each grave site in which reinterment is made or which is provided in exchange for an unused space in the existing cemetery, the fixed pergrave cost for such perpetual care and maintenance. The treatment of this payment will be identical to the treatment of payment for a relocation site which is being acquired by the contractor as provided in paragraph Q-73-804 below, for which the contractor pays on a reimbursable fixed-charge basis. In the event partial payments to the contractor are proposed, appropriate provisions must be made in the contract.

(d) Format of Plan. The main purpose of the Cemetery Relocation Plan is to present to the Federal court information to justify granting an order authorizing the relocation. Therefore, it should be concise; in a form and order easily reviewed; free of references not readily available to the court, such as Army or Corps of Engineers regulations; indexed; and securely bound on the left hand margin.

Q-73-803 Selection of New Sites. In selecting a new site, due consideration will be given to recommendations made by the cemetery organization or other interested parties, including the next of kin. Every reasonable effort will be made to procure a new site which meets with the approval of the interested parties. The new site will be accessible to roads and will be so located that expansion is practicable to provide additional graves which may be discovered during the progress of disinterment. The site will provide, as nearly as may be practicable, an area which will afford natural drainage, a type of soil that will lend itself to natural growth of landscaping to be provided by the contractor, and soil of sufficient depth and character to be free from rock formation, hardpan and water, and permit interment of bodies at minimum cost. Where doubt exists as to type, depth, and character of soil, test borings or holes will be made and all bidders will be given an opportunity to examine them before bidding. In localities where established cemeteries outside the project area are conveniently located in close proximity to the proposed removals, arrangements may be made for the relocation of bodies to

these established cemeteries when it is to the best interest of the Government, rather than to acquire a separate site. In no case will the site be on land owned by the Government.

Q-73-804 Acquisition of New Site.

(a) Purchase. Appraise the new site and have a preliminary title search made by a qualified attorney of the real estate division, of the Division or District Commander office, to determine that no legal obstacle will prevent acquisition of the new site in fee simple by purchase. Procure an option, using ENG Form 908, Option for Cemetery Site, running to the Division or District Real Estate Officer or his duly authorized representative and not to the United States. The period during which the option may be exercised will be for as long as the vendor will grant and in no event for a shorter period than will be required to have a recommendation for a condemnation proceeding processed through the Office of the Chief of Engineers and the Department of Justice for institution of a proceeding in the Federal Court and obtaining order of the court approving the plan of relocation. Until the court order approving the plan of relocation is entered, the option will not be accepted by the real estate officer, unless the removal of all bodies to the new site does not require a court order.

(b) Condemnation. Acquisition of the new site by institution of a condemnation proceeding by the Government is not encouraged. However, where the only site which is satisfactory to the cemetery association or the next of kin cannot be obtained within the Government's appraised value, a condemnation proceeding will be instituted by the Government to acquire the land. A condemnation proceeding will not be instituted until the Government has entered into a relocation agreement with the officials of the existing cemetery association who have the authority to convey the title to the existing cemetery. Title to the existing cemetery may be acquired by exchange of lands pursuant to Act of Congress dated 20 June 1938 (52 Stat. 802, 804; 33 U.S.C. 558b) as extended by the Act of 11 August 1939 (53 Stat. 1414; 33 U.S.C. 558b-1).

(c) Title Evidence. Procure title evidence, preferably a certificate of title, for the new site.

Q-73-805 Acquisition of Real Estate Interests and Extinguishment of Burial and Visitation Rights in Existing Site.

(a) Where a cemetery is to be relocated, the burial and visitation rights shall be extinguished simultaneously with the acquisition of the fee or easement interest in the land.

(b) A condemnation proceeding will be filed for the necessary real estate interests and in the same proceeding the court will be asked for an order extinguishing the outstanding burial and visitation rights and approving the plan of disinterment and reinterment.

Q-73-806 Condemnation of Cemetery Land and Court Order for Disinterment.

(a) Condemnation of cemetery land will be accomplished generally by the filing of a condemnation complaint prepared in the prescribed manner set forth in ER 405-1-640, paragraph 5. The Division or District Commander will submit the cemetery relocation plan as required in paragraph Q-73-802 with the condemnation assembly.

(b) Where obtainable, a stipulation with the owner or owners of the old cemetery site, that replacement of the site and relocation of the bodies, monuments and facilities will constitute just compensation, will be included in the condemnation assembly.

(c) The Department of Justice has emphasized the difficulty which is being encountered by that Department in attempting to secure Federal court orders approving the disinterment and reinterment of bodies buried in cemeteries. This problem becomes particularly troublesome in those instances where the Government has previously acquired the underlying fee or a flowage easement in particular tracts of land, on which private cemeteries are located, leaving rights of burial and visitation outstanding, and later attempts to eliminate these outstanding rights through court action and, at the same time, secure a court order approving the plan of relocation of the cemetery. Several courts have objected to this approach to the cemetery relocation problem on the theory that the court is without jurisdiction when no interest in the land is being acquired.

(d) To provide a basis for the court's jurisdiction, the following will be observed in acquiring cemeteries:

(1) Public Cemeteries (those under control of cemetery association, church, etc.): Fee and Flowage Easement Areas - (Cemetery will be relocated.) - Condemn cemetery under arrangements with the cemetery association for relocation. The fee title will be acquired in all instances and a complete plan of relocation must be submitted as a part of the condemnation assembly. The plan will be submitted to the court (by the Department of Justice) and a request made for an order of disinterment in accordance with the plan of relocation. No burial or rights of visitation will be left outstanding to be acquired at a later date.

(2) Private Cemeteries (those under control of an individual - family burial plot):

a. Fee Area - Cemetery will be relocated. No title defects and with or without agreement on price and relocation. Parent tract with small cemetery or burial ground. Fee will be acquired as a two-tract acquisition; i.e., separate descriptions of the parent tract to be acquired less and except the cemetery area, as one tract, and the cemetery area described separately as another tract. Title to the parent tract will then be acquired by purchase or condemnation. Rights of burial and/or visitation will not be left outstanding. The cemetery tract alone will then be condemned. However, the relocation plan for the cemetery must accompany the condemnation assembly. The estate will be fee simple. The Federal court will be asked to enter an order for disinterment and reinterment based on the plan.

b. Flowage Easement Areas - Cemetery will be relocated. Parent tract with small cemetery or family burial plot. Describe as two separate tracts as in a (supra). Acquire flowage easements in both tracts. Acquire the flowage easement over the parent tract by purchase or condemnation. The cemetery will be relocated. Condemn flowage easement in the cemetery tract. Relocation plan must accompany condemnation assembly for filing with the Federal court with request for an order of disinterment and reinterment in accordance with the plan. Rights of burial and/or visitation will not be left outstanding.

(3) In cases where options have already been taken, either for the fee or flowage easement, leaving outstanding rights of visitation and future burial and it is necessary to relocate the cemetery, a condemnation assembly will be submitted with a declaration of taking, including a plan of relocation, in accordance with the foregoing criteria (i.e., we will condemn the whole tract, including the cemetery area). If the acquisition of the whole tract has been completed and a final opinion of the Attorney General rendered, leaving the burial rights outstanding and relocation of the cemetery is required, the cemetery tract only will be condemned. The estate will be that set out in ER 405-1-640, Appendix III.

(4) Only under the most unusual circumstances will public cemeteries or private burial grounds be permitted to remain in the fee or flowage easement areas of civil works projects. Where these circumstances exist, a full and complete report, with recommendations, will be submitted to the Chief of Engineers for consideration and approval prior to submission of the condemnation assembly. The report will include factual data on the investigation, evidence that next of kin desire that the cemetery not be removed or that removal is impracticable, and evidence that leaving the cemetery in place and flooding will not violate any laws or health regulations. If the proposal to permit the cemetery to remain in place is approved, the procedure for acquiring the real estate interest will be the same as in a case involving a cemetery relocation except that the above described report containing factual data bearing on the decision to leave the cemetery in place, rather than a Relocation Plan (Design Memorandum) will be resubmitted with the condemnation assembly. If the cemetery is to be left in place at the request of the next of kin or other interested parties, an agreement or stipulation to this effect will be included with the assembly.

Q-73-807 Method of Actually Relocating a Cemetery. After obtaining the court order for disinterment, the work of actually relocating a cemetery generally will be accomplished by a Government contract in accordance with ECI EPT A-306. Due regard will be given to applicable state and local laws and regulations concerning cemetery relocations and, if necessary, the specifications will be revised to incorporate applicable provisions. The specifications will be approved by the trustees of the cemetery organization or other interested parties, if necessary. The above procedure does not preclude entering into relocation agreements with the organization having

jurisdiction and/or the next of kin. Nor does it preclude such organization or next of kin from agreeing to contract for the actual work of relocation. Provision should also be made for delivery to authorized persons, who must be qualified morticians, at the request of the next of kin, of the remains of the decedents who have been disinterred from cemeteries within project areas, together with any monuments, markers, or other facilities which have been removed from the old cemetery, for transportation to and reinterment and reerection in, another site other than the Government's reinterment site. In such cases, the Government will accomplish the disinterment and preparation for reinterment, and will deliver the old casket or the new casket furnished by the Government, including the remains, at graveside in the existing cemetery, or at another point requested by the next of kin no further distant than the Government's reinterment site. The Government will also make a monetary contribution, through the relocation contractor, toward the expenses of reinterment elsewhere, such monetary contribution to be limited to the additional amount which would have been expended under the relocation contract to accomplish the reinterment in the Government's reinterment cemetery, including such items as purchase of the burial site, opening and closing the grave, transportation to the Government's reinterment site (if that item represents a saving to the Government), and the reerection of any monuments, markers, or other facilities. In this instance, the cash contribution through the contractor, should be limited to the actual cost of the next of kin but should normally not exceed the amount which would have been expended by the Government had the remains been relocated as contemplated by the contractual agreement with the contractor. This limitation will not be exceeded except under most extenuating circumstances and then only with the approval of the Division Commander concerned. As an example, there have been cases where, because of the imminence of flooding of a cemetery by an authorized project, next of kin of decedents previously interred in the existing cemetery refrained from making further burials of other members of the family in available spaces in the existing cemetery. In lieu thereof, they made such burials in a new family plot acquired for the purpose in another cemetery in the general vicinity. In such cases, if the facts warrant, consideration should be given to contribution of the actual additional cost, if any, of relocation of members of the family from the existing cemetery to the new family plot. The main concern in such cases should be whether the reason for non-use of the existing cemetery for the recent burials is sufficiently valid to forestall accusations of preferential treatment. Consideration may also be given to the fact that had available spaces in the existing cemetery been used for the burials made after authorization of the project, it would have imposed an obligation on the Government to relocate the additional remains. Therefore, information should be included in the contract files as to the amount which it would have cost the Government to relocate such remains. "Available spaces" in the existing cemetery, as used in this paragraph means vacant spaces owned or controlled by the family or vacant spaces which the family could have acquired for the post-project-authorization burials.

Q-73-808 Supervision of Cemetery Relocations. All personnel concerned should recognize the unusual and sensitive nature of cemetery relocations and that every effort should be exerted to accomplish them with discretion, dispatch, and extraordinary attention to compliance with contract requirements. Proper certification of vouchers to the disbursing officer for payments will require that a check of the work performed be maintained throughout the entire relocation. As a further suggestion, contracting officers are authorized in appropriate instances to employ as a Community Liaison Employee some well known and respected local individual, possibly recommended by the cemetery association concerned, a local ministerial group, or other organization, to be employed as a liaison for the contracting officer for the purpose of locating and interviewing next of kin, relatives, and others who have indicated an interest, of the time the bodies are to be disinterred and reinterred. In instances where such an employee has been used, a local, usually retired, person of rather advanced age has proved to be very successful and as such should be employed under the status of W.A.E. and paid an appropriate wage. One District Commander also reports that very successful results were obtained when, since an appropriate Civil Service title and grade could not be found, the services of the Community Liaison Employee were obtained by a "Contract for Services". The contract agreed upon was for a flat daily fee paid for in increments of one-half day, plus eight cents per mile for travel. Especially good results have occurred where this individual is a local minister, acceptable to the members of the communities in which the cemeteries are located. The terms of his employment should not require the performance of reburial rites or ceremonies, but he may do so at his own volition, if desired by the next of kin. It is emphasized that this individual is to be used in addition to, and not in lieu of, an inspector at the site of the work. However, the individual may be given such authority to direct the work as is considered desirable by the District Commander. It is further suggested that the employee, in certain instances, where public relations might be improved thereby, be authorized to report directly to the District Commander concerned. It is further emphasized that if the magnitude and complexity of the work involved is considerable, it might be desirable to employ more than one Community Liaison Employee particularly if the work involves the relocation of graves of different religious faiths.

Q-73-809 Final Report. After completion of all work, a final and complete report will be prepared in quintuplicate. The report will include photographs of the old site and the new site after reinterment, and the methods used to satisfy the cemetery group, next of kin, and interested parties, with a description of the rededication ceremonies, if rededicated, and other pertinent information. Accompanying this report will be complete list containing the name of each body or other identification of all unknown bodies, the plan by graves before disinterment, and the plan by graves after reinterment, furnished by the contractor in accordance with specifications. The numbers assigned to cemetery plots in the acquisition of the land will be listed, showing the names of former owners, method of

acquisition, dates acquired, and kind of title acquired. An inspector's final certificate will be made part of this report stating in effect that the work required by the terms of the contract, and specifications attached, and any supplemental contracts, if any, have been fully and satisfactorily performed. The location of the final report and copies thereof (as set forth below) will be recited in informational folders and on reservoir signs prescribed by ER 1130-2-302. Distribution of the final report will be as follows:

Original for District Commander files

1 copy for Federal or State court issuing order for removal
1 copy for association having jurisdiction of relocated cemetery
1 copy to local county office of record (Register's Office)
1 copy to Resident (Reservoir) Manager or Post Engineer of military installation

No copy for files of Chief of Engineers; however, the District Engineer is to notify the Chief of Engineer, ATTN: DAEN-RE-AP through the Division Commander, upon completion of the relocation.

Q-72-810 Regulations Applicable to Certain Contracts Incident to Real Estate Activities. This paragraph is applicable to contracts or portions thereof which are incident to real estate or an interest therein. Contracts within the purview of this paragraph include, but are not limited to, the procurement of unspecified garage or storage space, title examination and abstracts, appraisals, services of real estate experts, and dismantling and demolition of buildings and improvements. Such contracts will be reviewed by the Office of Counsel in Division and District Offices and distributed in accordance with FAR 4.201.